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PRIVILEGES AND IMMUNITIES
OF
CITIZENS OF THE UNITED STATES

BY

ARNOLD JOHNSON LIEN, Ph.D.

Sometime Richard Watson Gilder Fellow in Political Science
Columbia University

New York
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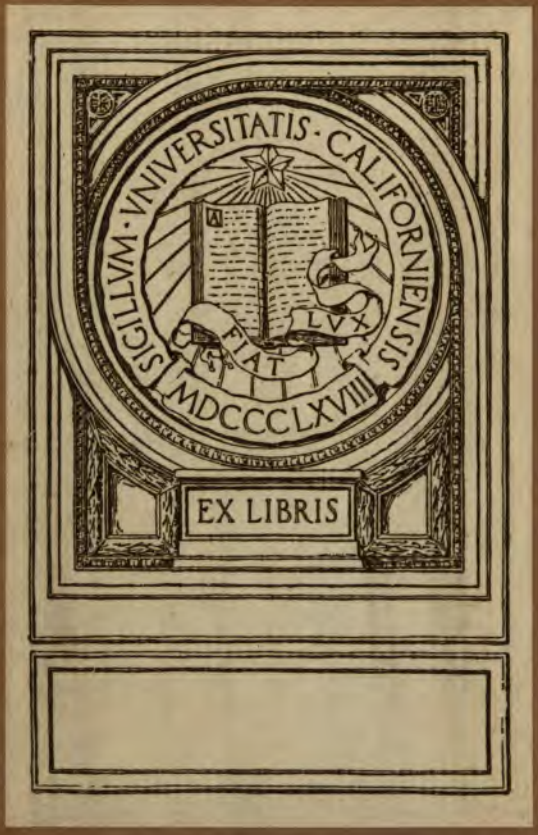
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PREFACE

To his students in the University of Colorado the author must trace his first incentive to undertake this little investigation. Together they searched but in vain for a work at once recent and intensive on the subject of the Privileges and Immunities of Citizens of the United States. Approval and encouragement from Professors Goodnow and Giddings of Columbia University set the seal on his plan.

It is not his object to make a study of privileges and immunities in the abstract; no more, of the privileges and immunities of citizens and subjects in general; nor yet of those of the citizens of the commonwealths in the American Union. This treatise will deal only with the privileges and immunities of citizens of the *United States*. For it is in connection with these that the greatest confusion and misunderstanding have arisen. To ascertain just what the Supreme Court of the United States has explained these privileges and immunities to be is the object of this dissertation. Neither what might have been nor perhaps what ought to have been, but what *is*.

In the preparation of the chapters which follow, the Reports of the Supreme Court have been gone through volume by volume from Dallas to 225. These constitute the basic material. The decisions of the inferior federal courts have also been examined so far as they have anything to add to the highly productive superior court. Some one hundred or more decisions rendered in the highest state courts were read, but found of little value for this particular study. The author has refrained from criticizing

the views of others and has devoted his whole attention to a study of the sources and fundamental principles.

No attempt has been made to deal exhaustively with the subjects of the first two chapters; for the object of the introductory part is merely to emphasize certain fundamentals of the American government which serve to explain the main points in the later chapters. Tables of cases and a brief list of standard works will be found in the appendix.

For constant inspiration and valuable criticisms and suggestions, the author is much indebted to Professor Frank J. Goodnow, under whose direction the chapters have been written. Also to Professors William A. Schaper and Frank M. Anderson of the University of Minnesota for helpful methods and training in research work. And not least to Professor John B. Moore for reading the manuscript and for suggestions.

A. J. LIEN.

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Page 32, 1st line, for Privileges, read "Privileges."
" 36, 4th line, for then, read than.
" 80, 17th line, for inidivdual, read individual.
" 87, Appendix, large heading, for of, read on.

(Lien)

AFTER THE [illegible]

CHAPTER V

PART III

SUMMARY AND CONCLUSION

CHAPTER VI

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PART I

INTRODUCTION

CHAPTER I

Salient Features of the American [1] Federal System

Back of the governments—central and commonwealth—the nation, united, sovereign, indestructible. "It began among the Colonies, and grew out of common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form, and character, and sanction from the Articles of Confederation." [2] By the adoption of the constitution in 1788, it was perfected in part; but the evolution of the nation has continued from that day to this, only marred from time to time by the outcropping of some hideous atavism endured but for a moment and then suppressed forever.

This same nation it was which expressed its sovereign will through the fundamental organ of government—the constitution of the United States,[3] and created a government, unique because American and American because unique. "It is a new type of government," as Merriam puts it, "peculiar to American conditions—a form at once national and federal, happily combining the characteristics of both." [4] Sovereignty—the ultimate, supreme, political,

[1] For an official substitution of the term "American" for "United States" in the diplomatic and consular service, see a circular letter by John Hay, Secretary of State (through A. A. Adee), 3 Aug., 1904. *Foreign Relations of the United States*, 1904, p. 7.

[2] Texas *v.* White, 7 Wall. 700, 724; New Hampshire *v.* Louisiana, 108 U. S. 76, 90; Crandall *v.* Nevada, 6 Wall. 35, 43.

[3] McCulloch *v.* Maryland, 4 Wh. 316, 403.

[4] *American Political Theories*, 255.

and law-making power [1]—remained in the nation, but adequate authority was allowed to the several governments to deal finally and supremely with all ordinary affairs, yet always subject to the intervention of the sovereign power. These words of Mr. Justice Matthews are quite apropos: [2]

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage.

The constitution is, therefore, simply a body of principles laid down by the sovereign people, prescribing in general the form and organs of the central government, distributing the powers of government among the central government and the several commonwealth governments, and imposing certain limitations on the exercise of those powers. Mr. Justice Swayne divides these powers into four classes. [3]

[1] Story's *Commentaries on the Constitution of the United States*, sec. 207, 5th ed., I, p. 149.

[2] Yick Wo. *v.* Hopkins, 118 U. S. 356, 369.

[3] *Ex parte* McNiel, 13 Wall. 236, 240. See also Weaver *v.* Fegely, 29 Penn. St. 27.

Those which belong exclusively to the states. Those which belong exclusively to the National Government. Those which may be exercised concurrently and independently by both. Those which may be exercised by the states, but only until Congress shall see fit to act upon the subject. The authority of the state then retires and lies in abeyance until the occasion for its exercise shall recur.

Since the commonwealth governments had practically, (not to minimize the great importance of the Articles of Confederation), occupied the whole field of governmental power and activity for several years prior to the adoption of the national constitution, the distribution of powers consisted very largely of depriving the commonwealths of certain powers and delegating those powers to the new government to be exercised by it either exclusively or concurrently. In addition certain prohibitions and limitations were imposed on both governments. This method led to an important distinction between the fundamental nature of the powers vested in the central government and those belonging to the governments of the commonwealths. The former are delegated, the latter reserved; the ones enumerated, the others general.[1] In the words of the tenth amendment to the constitution, "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The central government having no other source of powers than the constitution, and the constitution enumerating specifically the powers to be exercised by the central government, that government is necessarily limited to the subjects contained in those enumerations.[2] Nor can any sub-

[1] Gilman *v.* Philadelphia, 3 Wall. 713, 725; U. S. *v.* Cruikshank, 92 U. S. 542, 551.

[2] McCulloch *v.* Maryland, 4 Wh. 316, 405; U. S. *v.* Cruikshank, 92 U. S. 542, 549; South Carolina *v.* U. S., 199 U. S. 437, 448.

stantive power be derived from the preamble of the constitution, for that is merely a statement of the objects for which the Union was formed.[1] Furthermore, even upon the powers enumerated there are imposed important limitations. Some of these are stated in section 9 of Article I. Others are contained in the amendments.

While the constitution as originally adopted contained no separate bill of rights, nevertheless, many of the safeguards usually included in such bills were to be found in the section just cited. And indeed Marshall[2] expressed the idea that the limitations imposed by the constitution might well "be deemed a bill of rights for the people of each state."

It is, however, in the amendments that there appear the more cherished guaranties against the abuse of governmental power. The first ten were, no doubt, intended, and have always been held, to limit only the central government,[3] and not those of the commonwealths. And from the nature of the case they can have actual force and effect only in so far as they deal with and are applicable to the enumerated powers specifically delegated to the central government. Whether or not all of them can be made thus applicable, it yet remains to be seen. Hamilton's logic in the 84th number of the Federalist has not all been disjointed yet. The eleventh and twelfth deal with points of detail in the central government. The war amendments, either in their entirety or in part, apply to both central and commonwealth governments. The fourteenth and fifteenth are limited to governmental action as opposed to action by individuals;[4] but they extend equally to all branches of the

[1] Jacobson *v.* Massachusetts, 197 U. S. 11.

[2] Fletcher *v.* Peck, 6 Cranch 87, 137.

[3] For partial list of cases, see Appendix.

[4] Civil Rights Cases, 109 U. S. 3, 11; James *v.* Bowman, 190 U. S.

government and are not confined to legislative action.[1] "The Fourteenth and other amendments," reads the opinion in the case of Smoot *v.* The Ky. Central Ry. Co.,[2] "are limitations upon the power of the states, and to some extent an enlargement of the powers of Congress. But the enlargement of the powers of Congress is for the purpose and to the extent only of enforcing the limitations placed upon the power of the state."

Whatever changes in additions and subtractions may have been wrought by the amendments to the constitution, the fundamental nature of the powers of the respective governments has not been modified. Says Mr. Justice Brewer, "Notwithstanding the adoption of these three amendments, the National Government still remains one of enumerated powers, and the Tenth Amendment . . . is not shorn of its validity."[3]

Thus, in general, the amendments to the constitution have tended to restrict the powers conferred upon the Central Government. Important exceptions are found in the most recent amendments. But among the powers originally enumerated is one which has furnished the basis for an equally pregnant tendency to enlarge the scope of the other delegated powers. The last subdivision of the eighth section of Article I gives Congress the power "To make all laws which shall be necessary and proper for carry-

127; U. S. *v.* Reese, 92 U. S. 214; Tonawanda *v.* Lyon, 181 U. S. 389; Virginia *v.* Rives, 100 U. S. 313; *ex parte* Virginia, 100 U. S. 339; U. S. *v.* Cruikshank, 92 U. S. 542; U. S. *v.* Harris, 106 U. S. 629.

[1] Civil Rights Cases, 109 U. S. 3, 11; Chicago, Burlington & Quincy Ry. Co. *v.* Chicago, 166 U. S. 226, 233; Yick Wo *v.* Hopkins, 118 U. S. 356, 373.

[2] 13 Fed. R. 337, 343.

[3] Hodges *v.* The U. S., 203 U. S. 1, 16. See also, American Land Co *v.* Zeiss, 219 U. S. 47, 65.

ing into execution the foregoing powers, and all other powers vested by this constitution in the Government of the United States, or in any Department or Officer thereof." This is itself merely one of the enumerated powers, but it is perhaps more far-reaching than any other in that it applies to all of the others. Upon it is based the doctrine of "implied powers"—the term itself in a sense a misnomer inasmuch as the power involved is as distinctly enumerated as any one of the others. Chief Justice Marshall, speaking for the court in the case of McCulloch *v.* Maryland, has clearly defined and set the limit to this power.[1] He says,

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

Limited though the central government be, it is supreme within its prescribed jurisdiction. This fundamental principle was not overlooked when the Nation wrote its seven articles in the beginning. The second paragraph of the sixth article is in these words:

> This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United

[1] 4 Wh. 316, 421.

States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

The unambiguous meaning of this provision has been emphasized by the courts in numerous decisions.[1]

The basic facts of a system of dual government, of a central government with enumerated powers to which it is strictly limited, and of an established supremacy of that government within its delegated jurisdiction, have long been unquestioned.[2] "But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."[3]

In answering these questions, which in recent years have multiplied like Belgian hares, the court has ever been reluctant to decide more than what was actually necessary to a determination of the points at issue in the particular case.[4] When it is realized, as it clearly is by the Supreme Court, that the constitution was "intended to endure for ages and to be adapted to the various crises of human affairs,"[5] the wisdom of the policy of the court does not seem so far removed from reason after all. Furthermore, such a

[1] McCulloch *v.* Maryland, 4 Wh. 316, 405; South Carolina *v.* U. S., 199 U S. 437, 448 *et alia.*

[2] *Ibid.*

[3] McCulloch *v.* Maryland, 4 Wh. 316, 405.

[4] Davidson *v.* New Orleans, 96 U. S. 97, 104; Ward *v.* Maryland, 12 Wall. 418, 430; Slaughter-House Cases, 16 Wall. 36, 79; Conner *v.* Elliott, 18 How. 591, 593.

[5] Juilliard *v.* Greenman, 110 U. S. 421; South Carolina *v.* U. S., 199 U. S. 437, 448; Dred Scott *v.* Sandford, 19 How. 393, 426. For a suggestive account of the sufficiency of the constitution for present-day needs and conditions, see Frank J. Goodnow, *Social Reform and the Constitution; passim.*

policy makes it less difficult for the court to carry out and develop logically the conservatively progressive doctrine of precedent. The attitude of the court towards this doctrine has been recently expressed by Mr. Justice Lurton in these words: "The rule of *stare decisis*, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." [1] That the court does not adhere slavishly to the doctrine is evident.[2] It "has not failed to recognize the fact that the law is, to a certain extent, a progressive science." [3] and that even constitutional law is not infallible.[4]

Further, in giving its constructions, the court has adhered to these more or less widely controverted propositions: 1. that there is no separate and distinct common law of the United States; [5] 2. "that, although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words"; [6] 3. that the debate on a measure at the time of its enactment, which is as a rule limited to eloquent expressions by a very small number of men, does not neces-

[1] Hertz, Collector, *v.* Woodman, 218 U. S. 205, 212.

[2] See an article in the *Columbia Law Review*, vol. XII, no. 7, p. 603. G. W. Collins, "*Stare Decisis and the Fourteenth Amendment.*"

[3] Holden *v.* Hardy, 169 U. S. 366, 386. A very progressive statement by Mr. Justice Brown. See also a very liberal view expressed by Mr. Justice Holmes in Noble State Bank *v.* Haskell, 219 U. S. 104, 110.

[4] Blinn *v.* Nelson, 222 U. S. 1, 7.

[5] Western Union Telegraph Co. *v.* Call Pub. Co., 181 U. S. 92, 101; Smith *v.* Alabama, 124 U. S. 465, 478; Wheaton *v.* Peters, 8 Pet. 591. 658.

[6] Sturges *v.* Crowninshield, 4 Wh. 122, 202; Jacobson *v.* Mass., 197 U. S. 11.

sarily determine its meaning, but its language must be read in the light of the known condition of affairs.[1]

Mr. Justice Harlan[2] summarizes the fundamental principles in this way:

> That the Government created by the Federal constitution is one of enumerated powers, and cannot, by any of its agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may be implied when necessary to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, together with any treaties made under the authority of the United States, constitute the Supreme Law of the Land, a state of the Union may exercise all such governmental authority as is consistent with its own constitution, and not in conflict with the Federal Constitution.[3]

[1] U. S. *v.* Trans-Missouri Freight Association, 166 U. S. 318; Maxwell *v.* Dow, 176 U. S. 581, 601; Standard Oil Co. *v.* U. S. 221 U. S. 1, 50; U. S. *v.* Wong Kim, Ark., 169 U. S. 649, 699.

[2] House *v.* Mayes, 219 U. S. 270, 281.

[3] A more eloquent and prophetic statement is found in the decision of Kansas Natural Gas Co. *v.* Haskell *et al.*, 172 Fed. R. 545, 559. "True it is, hand in hand with the supreme national power, within its territorial borders, goes the sovereign power of the state; operating upon all matters of purely local or intrastate concern, which have not been committed to the control of the nation. The two powers, each in its proper sphere supreme, invade all our national space, wherever states have been created and their boundaries marked out, existing in absolute harmony one with the other, never, when properly interpreted, understood, and applied, coming in conflict with each other, but moving onward and upward in perfect harmony toward a broader and better civilization and a higher national destiny for all, with that accuracy and precision that governs the movement of the planets in their orbits or the seasons in their course."

CHAPTER II

Citizenship under the American System

Inherent in this peculiar duality of government in the United States is a corresponding duality of citizenship. The term citizenship here must be used in a strictly American sense, differing even from the closely related German sense, as implying merely subjection to two distinct governments, each (within its alloted sphere and for immediate practical purposes) sovereign and independent. Internationally, and even, at last analysis, nationally, an individual can partake of only a single citizenship—giving to the term its usual meaning of membership in an independent political society,[1] which, when put in somewhat more precise words, is simply membership in a sovereign state. To be sure, there are cases where two sovereign nations claim the citizenship of the same individual; but those arise only from an undetermined conflict of laws and are not at all instances of double citizenship. Other limitations on the meaning of the term coming from its American adaptation will appear in the course of the chapter.

The constitution of the United States as originally adopted and as amended prior to 1868, touched upon the fundamental nature of citizenship only by way of vague recognition and reference.

No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years

[1] *Am. & Eng. Cyc of L.*, 2d ed., VI, 15, and cases cited.

a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen. I, 2.

No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen. I, 3.

The Congress shall have power . . . to establish an uniform rule of naturalization; . . . to declare war; . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof. I, 8.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States. II, 1.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur. II, 2.

The Judicial power shall extend . . . to controversies . . . between a state and citizens of another state;—between citizens of different States;—between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects. III, 2.

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. IV, 2.

New States may be admitted by the Congress into this union. IV, 3.

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. VI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or

prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. Amendments, XI.

In these provisions there are quite distinctly recognized a citizenship of the United States and a citizenship of each particular commonwealth, but the nature of each and the relation between them are nowhere defined or explained. Furthermore, a distinction is suggested between natural born citizens and naturalized citizens; but here again definitions and explanations are wanting. The full meaning, whether expressed or suggested or implied, of these scattered fragments was left for the Supreme Court laboriously to work out.

That the common-law doctrine of *jus soli* was back of the references of the constitution to natural-born citizens has never been very widely doubted. In 1857, what was very probably the generally accepted view as well as the view adhered to by the government, was thus expressed by Mr. Justice Curtis:[1]

The 1st section of the 2d article of the constitution uses the language, "a natural-born citizen." It thus assumes that citizenship may be acquired by birth. Undoubtedly, this language of the constitution was used in reference to that principle of public law, well understood in this country at the time of the adoption of the constitution, which referred citizenship to the place of birth.

But this same Justice held that, while birth within the jurisdiction made a person eligible for citizenship, yet it was only the commonwealth that could actually make him a

[1] Dred Scott *v.* Sandford, 19 How. 393, 576. See also: U. S. *v.* Wong Kim, Ark., 169 U. S. 649; U. S. *v.* Rhodes, 1 Abbott (U. S.) 28, 40; Lynch *v.* Clarke, 1 Sandford, ch. 583; 2 Whart., *Int. Dig.* (2d ed.), 394; 9 Opinions, 373; 10 Opinions, 328, 382, 394, 396.

citizen. This was a power which had belonged to the states before the adoption of the constitution. It had never been given up to the central government, and was, therefore, reserved to the commonwealths or to the people. The only way a person, even though he had been born within the United States, could become a citizen of the United States was by admission to citizenship in a commonwealth. On this point, however, there was a considerable difference of opinion.[1] This extreme and strained construction was in harmony neither with the theory nor with the practice of the National Government.[2] Yet it was one of the open questions which was to be closed by the fourteenth amendment.

The other method of acquiring citizenship, recognized by the constitution, was by naturalization. In this matter, power is specifically delegated to the central government.[3] For a time it was regarded as one of the concurrent powers to be exercised as well by the commonwealth governments as by the central government, the latter taking precedence in case of conflict;[4] but this was only during the period of readjustment, and as early as 1797 the exclusiveness of the power was suggested.[5] In 1817, the Great Chief Justice used these definitive words:[6] "That the power of naturalization is exclusively in Congress does not seem to be, and certainly ought not to be controverted."

The power was construed by the states-rights men as

[1] *Op. cit.*, and Talbot *v.* Janson, 3 Dall. 133.

[2] See J. B. Moore, *Four Phases of American Development*, 59; *et supra.*

[3] Art. I, 8.

[4] Collet *v.* Collet, 2 Dall. 294.

[5] U. S. *v.* Villato, 2 Dall. 370.

[6] Chirac *v.* Chirac, 2 Wh. 259, 269.

extending only to the removal of the disabilities of alienage.[1] After these disqualifications had been removed under the process prescribed by Congress—which has been held to be a judicial process[2]—the individual, so far as eligibility to full citizenship was concerned, was in exactly the same position as the person born within the jurisdiction—that is, he could become an active citizen only through some action by the commonwealth.[3] About this point, again, therefore, there was a great variety of opinions which only the post-bellum amendment could unify.

The large questions were unsettled, and remained unsettled until 1868; but there were many early expressions of principles identical with those established by the amendment. Chief Justice Marshall gave this as the view of the court in 1832:[4] "The defendant in error is alleged in the proceedings to be a citizen of the United States naturalized in Louisiana and residing there. This is equivalent to an averment that he is a citizen of that state. A citizen of the United States, residing in any state of the union, is a citizen of that state." It was often asserted that a person could be a citizen of the United States without being a citizen of any particular commonwealth.[5]

In discussing this question, [says[6] Chief Justice Taney], we

[1] Mr. J. Curtis dissenting: Dred Scott *v.* Sandford, 19 How. 393, 576 *et seq.* Also, Calhoun's *Works*, II, 496 *et seq.* (Senate, 2 Apr., 1836).

[2] Spratt *v.* Spratt, 4 Pet. 393; but see Johannessen *v.* U. S. 225 U. S 227.

[3] Scott *v.* Sandford, 19 How. 393, 576 *et seq.* Also, Calhoun's *Works*, II, 496 *et seq.* (Senate, 2 Apr., 1836).

[4] Gassies *v.* Ballon, 6 Pet. 761.

[5] Hepburn & Dundas *v.* Ellzey, 2 Cr. 445; Moore *v.* People of Illinois, 14 How. 13, 20; Prentiss *v.* Brennan, 2 Blatchf. 162, 164.

[6] Dred Scott *v.* Sandford, 19 How. 393, 405, 406.

must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a state, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a state, and yet not be entitled to the rights and privileges of a citizen in any other state. For previous to the adoption of the constitution of the United States, every state had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. . . . Nor have the several states surrendered the power of conferring these rights and privileges by adopting the constitution of the United States. Each state may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons; yet he would not be a citizen in the sense in which that word is used in the constitution of the United States, nor entitled to sue as such in any one of its courts, nor to the privileges and immunities of a citizen in the other states. The rights which he would acquire would be restricted to the states which gave them. . . . It is very clear, therefore, that no state can, by any act or law of its own, passed since the adoption of the constitution, introduce a new member into the political community created by the constitution of the United States. It cannot make him a member of this community by making him a member of its own.

To all of this confusion and uncertainty the Fourteenth Amendment put an end. It provides that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." This enactment put a constitutional stamp upon the doctrine of *jus soli*, and superseded any principle which may have required some action on the part of the commonwealth preliminary to the acquisition of citizenship as a result of birth within the

country. It made the process of naturalization the only and final one in the adoption of persons, alien-born, as citizens of the United States.[1] Citizenship of the United States was declared to be the more fundamental of the two, in that any person who desires to become a citizen of a commonwealth can do so merely by first becoming a citizen of the United States, and then taking up a residence in the commonwealth.[2] The dual nature of American citizenship has thus been firmly established. But this citizenship is not open to all. Section 2169 of the compiled statutes, reads that "the provisions of this Title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." The phrase "white persons" has been construed to refer to race rather than to color, and so to include such peoples as Mexicans, Armenians, Parsees, Syrians, and to exclude Chinese, Japanese, Hawaiian-Kanakas, *etc.*[3] Technically, the inhabitants of Porto Rico (and presumably the same reasoning would apply to the Filipinos) would be excluded not by the phrase "white persons" but by the term "aliens"; for it has been held by the Supreme Court that Porto-Ricans are not aliens.[4] Being neither aliens nor citizens, they have a status peculiar to themselves, for a description or designation of which existing vocabularies contain no word. Perhaps it would be both appropriate and timely to derive the term appurtezens from the word appurtenant used by

[1] Lanz *v.* Randall, 4 Dill. 425, 429; Minneapolis *v.* Reum, 12 U. S. App. 446.

[2] The Slaughter House Cases, 16 Wall. 36, 74.

[3] *In re* Rodriguez, 81 Fed. 337; *in re* Halladjian, 174 Fed. 834; U. S. *v.* Balsara, 180 Fed. 694; *in re* Mudarri, 176 Fed. 465; *in re* Ellis, 179 Fed. 1002; *in re* Ah Yup, 1 Fed. Cas. 223; *in re* Saito, 62 Fed. 126; *in re* Kanaka Nian, 21 Pac. R. 993; *in re* Camille, 6 Fed. 256.

[4] Gonzales *v.* Williams, 192 U. S. 1.

the court in defining the position of the insular territory,[1] just as the term citizen has been derived from the word city. These limitations of section 2169 do not apply to the acquisition of citizenship by birth within the jurisdiction.[2]

"The term citizens," as used in Article IV, 2, of the constitution, "applies only to natural persons, members of the body politic, owing allegiance to the state, not to artificial persons, created by the legislature, and possessing only the attributes which the legislature has prescribed."[3] The same construction has been given to the identical term used in the Fourteenth Amendment.[4] But for purposes of mere jurisdiction under Article III, where the term again occurs, corporations are included as well as individuals.[5] So also, it has been held that a private corporation may take mineral claims on the public lands just as an individual.[6]

In dealing with those who are eligible to citizenship, Congress has provided several distinct methods of naturalization. These may be divided first of all into individual naturalization and collective naturalization. Under the former, which is the most common method, a general statute prescribes the procedure in detail and the law is administered by the courts as individual applications are made. To this general class would belong also the method of

[1] Downes *v.* Bidwell, 182 U. S. 244, 287.

[2] U. S. *v.* Wong Kim Ark., 169 U. S. 649.

[3] Paul *v.* Virginia, 8 Wall. 168, 177. See also, Blake *v.* McClung, 172 U. S. 239; O. & Miss. Ry. Co. *v.* Wheeler, 1 Black 286.

[4] Western Turf Association *v.* Greenberg, 204 U. S. 359, 363; N. W. Life Ins. Co. *v.* Riggs, 203 U. S. 243; Orient Ins. Co. *v.* Daggs, 172 U. S. 557; Selover, Bates & Co. *v.* Walsh, 33 S. Ct. 69.

[5] Thomas *v.* Board of Trustees, 195 U. S. 207; Bank of Augusta *v.* Earle, 13 Pet. 586; Paul *v.* Virginia, 8 Wall. 168; Hope Insurance Co. *v.* Boardman, 5 Cr. 57.

[6] McKinley *v.* Wheeler, 130 U. S. 630.

naturalization by the marriage of an alien woman qualified for citizenship to a citizen.[1] Of the latter, there are various types: 1, By the Declaration of Independence;[2] 2, by Treaty;[3] 3, by Joint Resolution;[4] 4, by the admission of a commonwealth;[5] 5, by Act of Congress, the best example of which is perhaps the naturalization of the emancipated negroes in 1866;[6] and 6, in the case of minor children, by the naturalization of the father.[7] That the counterpart of naturalization is expatriation is formally recognized in section 1999 of the compiled statutes.

Thus in all of these ways and by all of these persons may American citizenship be acquired. The controlling power over naturalization is vested in Congress; citizenship as a birthright is established in the Fourteenth Amendment. Priority in the matter of citizenship belongs to the central government. And, finally, using the term citizenship in its American sense, "it is quite clear . . . that there is a citizenship of the United States and a citizenship of a state, whch are distinct from each other, and which depend upon different characteristics or circumstances in the individual."[8] Duality of government has led to duality of citizenship; and duality of citizenship has necessarily led to duality of privileges and immunities.

[1] Kelley *v.* Owen, 7 Wall. 496.

[2] Boyd *v.* Thayer, 143 U. S. 135, 163; U. S. *v.* Ritchie, 17 How. 525, 539; Inglis *v.* Trustees of Sailors Snug Harbor, 3 Pet. 99, 121.

[3] American Insurance Co. *v.* Canter, 1 Pet. 511.

[4] Contzen *v.* U. S., 179 U. S. 191.

[5] Boyd *v.* Thayer, 143 U. S. 135.

[6] Matter of Heff, 197 U. S. 488; Civil Rights Act, 14 St. at Large, 27.

[7] Boyd *v.* Thayer, 143 U. S. 135.

[8] The Slaughter House Cases, 16 Wall. 36, 74.

PART II

PRIVILEGES AND IMMUNITIES OF CITIZENS OF THE UNITED STATES

CHAPTER III

Before the Fourteenth Amendment

The terms "privileges" and "immunities" are not inventions of American constitutional law, but have their origin, as do far and away the larger number of words in the legal terminology of the United States, in the historically evolved law-language of Great Britain. They recur again and again, either *eo nomine* or under a synonym, from the *Magna Charta* of King John to the constitution of President Washington. The words of number IV of the Articles of Confederation were repeated in Article IV of the constitution and again in the Fourteenth Amendment. The constitutions of the several states before the Union and of the commonwealths thereafter contained similar terms.

The words are old. But it is a peculiar characteristic of America to make old things new. So here. The adaptation of the terms to American conditions has slightly changed their meaning. Of the multiplicity of definitions which have been made, none seems any more accurate than the following:

> The word "privilege," according to one definition given by standard lexicographers, means that which one has a legal claim to do; legal power; authority; immunity granted by authority; the investure with special or peculiar rights. . . . The words "privileges" and "immunities" are synonymous, or nearly so; and "privilege" signifies a peculiar advantage, exemption, immunity, and "immunity" signifies exemption, privilege.[1]

[1] 6 *Def. of Words and Phrases,* 5583, 5584. See also, Connor *v.* Elliott, 18 How. 591, 593.

"Privileges," in United States constitutional amendment 14, is comprehensive, and includes all rights pertaining to the person as a citizen of the United States.[1]

It is the authoritative opinion, more universal today than ever before, that rights (privileges and immunities), no matter what their theoretical origin may have been, have no practical force or effect unless they have back of them the sanction of the law, be that law common or statutory or constitutional. Under the general and reserved powers of the commonwealths in the United States where exist all of these three kinds of law, the rights (privileges and immunities) sanctioned are very comprehensive and far-reaching. The central government, on the other hand, which has only such powers as are by enumeration delegated to it, and which has, it is said, no distinct common law, can manifestly give force and effect only to those rights (privileges and immunities) which arise in the spheres over which it has jurisdiction. Let an alleged right of a citizen of the United States be proclaimed to the ends of the earth, so long as power has not been conferred on the central government to protect that right, it will remain a paper right, which, being interpreted, is no right at all. In speaking of the powers of the government in this connection, Chief Justice Waite used words which clinch the whole point: "It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction."[2]

The significance of the Bill of Rights must here be restated; and by the Bill of Rights is meant here, not only the first instalment of the amendments, but all those provisions of the constitution which in their nature partake

[1] 2 Abbott's *Law. Dict.*, 318.

[2] U. S. *v.* Cruikshank, 92 U. S. 542, 550.

of the fundamental characteristics of a historical Bill of Rights. So far (and only so far) as its provisions relate to matters over which the central government has been granted jurisdiction, it serves as a limitation upon that government. To the extent that it prohibits the central government from acting, it reserves that power to the people or to the commonwealths. Where the prohibition extends to both the central government and the governments of the commonwealths, it reserves the power exclusively to the people.[1] Technically, therefore, the privileges and immunities of the citizen arise, not from the Bill of Rights, but from the powers upon which the provisions of the Bill of Rights serve as limitations.

What these substantive privileges and immunities really are, the Supreme Court has indicated from time to time through a century and nearly a quarter. Nor could this very well have been otherwise when it is remembered that the system created thus long ago was intended to be forever applicable to the manifold vicissitudes of a progressive nation. In fact, it is this same feature of scientifically and artfully interpreting the provisions of the constitution so as to permit them to expand, as they were intended to expand, in harmony with the ever-changing conditions of America that makes most hopeful the permanency and the perfection of the Republic.

A brief statement in regard to the privileges and immunities of the citizens of the commonwealths referred to in Article IV, 2, is perhaps essential to a complete understanding of the privileges and immunities of citizens of the United States. In the article mentioned, it is provided that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several

[1] Munn *v* Ill., 94 U. S. 113, 124.

states." Two distinct constructions have been put upon the words as they occur in this section: 1, that the privileges and immunities here referred to are those which are in their nature fundamental and inherent in all free governments; 2, that the privileges and immunities of a citizen of one commonwealth to be enjoyed by him in another commonwealth are only such as are enjoyed in the second commonwealth by its own citizens.

The classical expression of the first view is by Mr. Circuit Justice Washington in the case of Corfield *v.* Coryell.[1]

> The inquiry is what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following heads: the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges

[1] 6 Fed. Cas. 546, 551.

deemed to be fundamental, to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

The most cursory analysis of this statement establishes the fact that all of its coloration has been extracted from the doctrine of natural rights and the Declaration of Independence.

The second view can probably be said to be the one commonly accepted by the courts today. Mr. Justice Field gives a clear expression of it when he says:[1]

> It was undoubtedly the object of the clause in question to place the citizens of each state upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those states are concerned. It relieves them from the disabilities of alienage in other states; it inhibits discriminating legislation against them by other states; it gives them the right of free ingress into other states, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those states in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other states the equal protection of their laws. It has been justly said that no provision of the constitution has tended so strongly to constitute the citizens of the United States one people as this.

This interpretation is based upon the underlying principle of equality of treatment. It limits the application of IV, 2. more exclusively to citizens of the commonwealths than does the former in which there is at least a suggestion of a vague citizenship-in-common.

During the eighty years of the Union prior to the adop-

[1] Paul *v.* Virginia, 8 Wall. 168, 180. See also, Ward *v.* Maryland, 12 Wall. 418, 430; Downham *v.* Alexandria Council, 10 Wall. 173, 175; Chambers *v.* B. & O. Ry. Co., 207 U. S. 142, 148; McKane *v.* Durston, 153 U. S. 684.

porting passengers for hire," and that the proprietors, owners, and corporations so engaged should pay the said tax of one dollar for each and every person so conveyed or transported from the state.

Crandall, the agent of a stage company, refused to make the reports required by the law and to pay the tax. He was arrested and convicted. From the highest court of the commonwealth, he appealed on the ground that the law of Nevada violated the constitution of the United States. Mr. Justice Miller wrote the opinion of the court, Chief Justice Chase and Mr. Justice Clifford dissenting from the argument while concurring in the conclusion.

The people of these United States, [reads the opinion], constitute one nation. They have a government in which all of them are deeply interested. This government has necessarily a capital established by law, where its principal operations are conducted. Here sits its legislature, composed of senators and representatives, from the states and from the people of the states. Here resides the president, directing through thousands of agents, the execution of the laws over all this vast country. Here is the seat of the supreme judicial power of the nation, to which all its citizens have a right to resort to claim justice at its hands. Here are the great executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations. These are all established and conducted under the admitted powers of the Federal government. That government has a right to call to this point any or all of its citizens to aid in its service, as members of the Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a state over whose territory they must pass to reach the point where these services must be rendered. The government, also, has its affairs of secondary importance in all other parts of the country. On the sea-

coasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a state to obstruct this right that would not enable it to defeat the purposes for which the government was established.

The Federal power has a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any state of the Union.

If this right is dependent in any sense, however limited, upon the pleasure of a state, the government itself may be overthrown by an obstruction to its exercise.

But if the government has these rights on her own account, the citizen also has correlative rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several states, and this right is in its nature independent of the will of any state over whose soil he must pass in the exercise of it.

Here is a large and elastic group of privileges and immunities based neither, on the one hand, on abstract doctrines of natural rights or universally inherent rights, nor, on the other hand, on specific provisions of law. They arise from governmental powers implied in powers specifically enumerated or inherent in governmental organs specifically established or created—not inherent in all free governments, but inherent in the government of the United States provided through specific, enumerative enactments. The right of access to the courts of the United States has

been recognized in a number of cases arising both before [1] and after [2] the adoption of the Fourteenth Amendment. Closely related to this right is the more general right of trial according to law.[3]

It is in regard to the right of citizens, as citizens, to hold property that the greatest vagueness and indefiniteness exist. Mr. Justice Story came as close as anyone to a direct assertion of the existence of such a right when he said [4] that the right to hold property is based on "a great and fundamental principle of a Republican government, the right of the citizens to the free enjoyment of their property legally acquired." In Vanhorne's Lessee *v.* Dorrance,[5] this is held to be "one of the natural, inherent, and unalienable rights of man." [6] But it would probably not be fair to conclude from these somewhat obscure suggestions and implications that the right of property is one of the privileges and immunities of national citizens. The decisions in general use terms which would ascribe the right to all persons, whether citizens or not. At the present time, it would undoubtedly be allotted to that large class of rights which belong to citizens of the commonwealth, but differing from many others in its protection by the central government under the "due process of law" clause.

In the case of Cummings *v.* Missouri, the natural-rights

[1] Dred Scott *v.* Sandford, 19 How. 393, 403; Suydam *v.* Broadnax, 14 Pet. 67, 74, 75; Union Bank of Tenn. *v.* Jolly's Adm., 18 How. 503; Marshall *v.* B. & O. Ry. Co., 16 How. 314, 329.

[2] Insurance Co. *v.* Morse, 20 Wall. 445, 451.

[3] *Ex parte* Milligan, 4 Wall. 2, 119.

[4] Terrett *v.* Taylor, 9 Cr. 43, 51, 52.

[5] 2 Dall. 304, 310.

[6] See also: Soulard *v.* U. S., 4 Pet. 511; Wilkinson *v.* Leland, 2 Pet. 627, 657; Spratt *v.* Spratt, 1 Pet. 343; Fletcher *v.* Peck, 6 Cr. 87, 135, 139; Delassus *v.* U. S., 9 Pet. 117, 133; Dred Scott *v.* Sandford, 19 How. 393, 407 *et alia.*

argument again came into prominence. The constitution of that commonwealth provided a test-oath to be taken by all officers, teachers, ministers, *etc.* Under this requirement, a priest of the Catholic Church was convicted and fined. The case was brought to the Supreme Court of the United States. The following sentences are in the words of Mr. Justice Field, who spoke for the court: [1]

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no other wise defined.

The constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizens should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised.

The right to mail-matter was considered in Teal *v.* Felton,[2] but was not established as a right peculiar to citizens. The rights of religious liberty [3] and, in general, of safety, happiness, and prosperity [4] fall under the jurisdiction of the several commonwealths.

On December 18, 1865, the Thirteenth Amendment was declared in force. It is in these words:

[1] 4 Wall. 277, 321, 325. Also *ex parte* Garland, 4 Wall. 333.

[2] 12 How. 284.

[3] Permoli *v.* First Municipality, 3 How. 589, 609. See also, Davis *v.* Beason, 133 U. S. 333; Reynolds *v.* U. S. 98 U. S. 145.

[4] City of New York *v.* Miln, 11 Pet. 102, 139; U. S. *v.* Eberhart, 127 Fed. 254.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Thus there is no reference whatever to citizens either of the nation or of the commonwealths. But in less than four months, Congress, in pursuance of the new amendment, had enacted very far-reaching legislation. The Civil Rights Act of April 9, 1866, was at the same time a vast naturalization act and an act to secure to the new black citizens the same fundamental privileges and immunities as were enjoyed by white national citizens. As it was passed over the veto of President Johnson it was in these words:

All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[1]

The constitutionality of this act was never passed upon

[1] 14 U. S. St. at Large, 27.

by the Supreme Court; but it was twice upheld in decisions rendered in circuit courts—once in an opinion by Mr. Justice Chase, Chief Justice of the Supreme Court;[1] and once in a case decided by Mr. Justice Swayne.[2] And, in fact, the provisions of the act seem pretty safely within the legitimate powers of Congress;[3] for, outside of the naturalization clauses, they go no farther than to secure to the new national citizens the same rights in the matters specified as are secured to the old citizens. If the old had no rights, neither would the new. Nevertheless, the constitutionality of the act was questioned by many, and, in part, it was "to make assurance doubly sure"[4] that the principles of the act were incorporated in the first section of the Fourteenth Amendment, and there more clearly defined and established beyond legislative control.[5]

When the period up to 1868 is viewed as a whole, it appears that the privileges and immunities of national citizens established with a considerable degree of certainty and clearness are such as relate to foreign affairs, commerce, the operation of the organs of the government, expatriation, and migration. While abstract doctrines and metaphysical speculations have not been wanting in the arguments, yet, even from these comparatively few scattered decisions, distinctly appears the tendency of the court logically to set off the jurisdiction of the central government as the only source of the privileges and immunities of citizens of the United States.

[1] *In re* Turner, 24 Fed. Cas. 337.

[2] U. S. *v.* Rhodes, 27 Fed Cas. 785.

[3] U. S. *v.* Morris, 125 Fed. 322, 330. The act was commented upon in the Civil Rights Cases, 109 U. S. 3, 22.

[4] Mr. Broomall, *Cong. Globe*, 1 S. 39 C. III, 2498.

[5] Sen. Howard, *Cong. Globe*, 1 S. 39 C. IV, 2896.

CHAPTER IV.

After the Fourteenth Amendment

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation." If honestly received and fairly applied, this provision would have been enough to guard the rights of the colored race. In some states it was attempted to be evaded by enactments cruel and oppressive in their nature—as, that colored persons were forbidden to appear in the towns, except in a menial capacity; that they should reside on and cultivate the soil without being allowed to own it; that they were not permitted to give testimony in cases where a white man was a party. They were excluded from performing particular kinds of business, profitable and reputable, and they were denied the right of suffrage. To meet the difficulties arising from this state of things, the fourteenth and fifteenth amendments were enacted.[1]

Much of the time of the first session of the 39th Congress was taken up with the preparation of the various sections of the Fourteenth Amendment, each one of which was the subject of extensive remarks and debate first in the House and later in the Senate. Only the first section of this article is of importance in this connection, and it is this same section which is usually thought of whenever the Fourteenth Amendment is mentioned. It was designated by counsel in

[1] U. S. *v.* Anthony, 24 Fed. Cas. 829. Quoting in part from Slaughter House Cases, 16 Wall. 36, 70.

an early case as "the *Magna Charta* of (your) rights and liberties." [1] The following are its words:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws.

This cleared up,[2] and was intended to clear up,[3] the whole maze of American citizenship, by putting into definite form that which had been vague and uncertain. The meaning of this first sentence does not seem to have been in doubt at any time, nor do the records of the debates reveal any considerable objection to the declaration which it makes.

On the three remaining clauses of the section, however, there was not at the time, nor has there ever been, such unanimity of opinion. Mr. Broomall held the purpose of the first of these clauses to be "to give power to the government of the United States to protect its own citizens within the states, within its own jurisdiction." [4]

Senator Poland was of the opinion that "the clause . . . secures nothing beyond what was intended by the original provision in the constitution, that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'" But the changed conditions, the disregard by the states of the original provision, the emanci-

[1] Slaughter House Cases, 16 Wall. 36, 55.

[2] *Ibid.*, 72, 73.

[3] *Congressional Globe*, 1 S. 39 C. IV, 2896 (Sen. Howard). Also p. 2890.

[4] *Cong. Globe*, 1 S. 39, C. III, 2498.

pation of the negroes, "render it eminently proper and necessary that Congress should be invested with the power to enforce this provision throughout the country and compel its observance." [1]

In the words of another member of Congress: "So far as this section is concerned, there is but one clause in it which is not already in the constitution, and it might as well . . . read 'no state shall deny to any person within its jurisdiction the equal protection of the laws.'" [2]

To a member of the extreme opposition, the first clause of the second sentence had a much more comprehensive meaning. In his own words, he thus answered the question put by himself.

> What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any state from refusing to allow anything to anybody embraced under this term of privileges and immunities. If a Negro is refused the right to be a juror, that will take away from him his privileges and immunities as a citizen of the United States, and the Federal Government will step in and interfere, and the result will be a contest between the powers of the Federal Government and the powers of the states.[3]

Mr. Bingham spoke of all three clauses:

> There was a want hitherto, and there remains a want now, in

[1] *Cong. Globe*, 1 S. 39 C. IV, 2961.

[2] Mr. Farnsworth, *ibid.*, III, 2539.

[3] Mr. Rogers, *ibid.*, III, 2538. Also Mr. Randall, *ibid.*, III, 2530.

the constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do, that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any state.

Allow me, Mr. Speaker, in passing to say that this amendment takes from no state any right that ever pertained to it. No state ever had the right, under the forms of law or otherwise, to deny any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several states.[1]

Of the two last clauses, Senator Henderson said: "The remaining provisions of the section . . . merely secure the rights that attach to citizenship in all free governments." [2]

Similarly, it is suggested in the remarks of Senator Howard that the guarantees of those rights which inhere in all free governments were intended to be included, not in the "privileges and immunities" clause, but in the "due process" and "equal protection" clauses. Referring to the provisions of the Fifth, and other amendments, he says:

They do not operate in the slightest degree as a restraint or prohibition upon state legislation. States are not affected by them, and it has been repeatedly held that the restriction con-

[1] *Ibid.*, III, 2542.

[2] *Ibid.*, IV, 3031. See also, Mr. Stevens, *ibid.*, III, 2459; Mr. Shanklin, *ibid*:. III, 2500; Sen. Poland, *ibid.*, IV, 2961.

tained in the constitution against the taking of private property for public use without just compensation is not a restriction upon state legislation, but applies only to the legislation of Congress. There is no power given in the constitution to enforce and to carry out any of these guarantees. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the states and compel them at all times to respect these great fundamental guarantees. The last two clauses of the first section of the amendment disable a state from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the state. This abolishes all class legislation in the states, and does away with the injustice of subjecting one caste of persons to a code not applicable to another. . . . Section one is a restriction upon the states, and does not, of itself confer any power upon Congress. . . . I look upon the first section taken in connection with the fifth, as very important. It will, if adopted by the states, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.[1]

From these typical statements, it is quite clear that there was no absolute unanimity of opinion among the members of Congress as to the exact meaning of the provisions in the first section of the amendment. On the other hand, the excerpts here given, as well as the debates at large, *tend* to show that the men who proposed the amendment had in

[1] *Ibid.*, III, 2764 *et seq.* Also cited in William D. Guthrie, *The Fourteenth Amendment*, p. 22.

mind to protect against abridgment by the commonwealths first, those privileges and immunities which are peculiar to national citizens and which arise from national citizenship, as such, and second those fundamental rights of life, liberty, property, equality, which are commonly rights of citizens under every free government, those of the American commonwealths not excepted. Taken together, these two objects are very broad and comprehensive; but they are distinct, and neither one includes the other. What the privileges and immunities of citizens of the United States were had already been partially defined. The "due process" clause and the "equal protection" clause arose from a desire to extend to the commonwealths the more important of the limitations contained in the first eight amendments and applicable only to the central government. The vast scope and extent of these two clauses have been brought out only within the last few years.[1] But these two far-reaching clauses must always be kept distinct and apart from the more limited "privileges and immunities" clause here under consideration; for the rights guaranteed under each are essentially different.

Of this debate, Mr. Justice Peckham, speaking for a court, unanimous but for one dissent, said in part:

It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be

[1] Co. of Santa Clara *v.* S. P. Ry. Co., 18 Fed. 385; Pennoyer *v.* Neff, 95 U. S. 714; Davidson *v.* New Orleans, 96 U. S. 97; Yick Wo *v.* Hopkins, 113 U. S. 27; Allgeyer *v.* Louisiana, 165 U. S. 578; Holden *v.* Hardy, 169 U. S. 366 (and cases cited); Booth *v.* Illinois, 184 U. S. 425; Japanese Immigrant Case, 189 U. S. 86; Atkin *v.* Kansas, 191 U. S. 207; Rogers *v.* Alabama, 192 U. S. 226; Lochner *v.* New York, 198 U. S. 45; Second Employers' Liability Cases, 223 U. S. 1, 52; Collins *v.* Texas, 223 U. S. 288; Charles W. Collins, *The Fourteenth Amendment and the States, passim.*

before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used and not by the speeches made regarding it.

What individual senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it. . . .

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three-fourths of the states before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted.[1]

It was not before April 14, 1873 that the Supreme Court of the United States gave its first opinion as to the meaning of the "privileges and immunities" clause of the new amendment.[2] The legislature of Louisiana, with the intention of protecting the public health, had granted monopoly privileges to a Live-Stock-Landing and Slaughter-House Company in New Orleans.[3] Individual butchers within the city filed petitions with the local court asking

[1] Maxwell *v.* Dow, 176 U. S. 581, 601.

[2] The Amendment had been proposed on the 16th June, 1866, and declared in force on the 20th July, 1868.

[3] Slaughter House Cases, 16 Wall. 36.

for an injunction to restrain the company from proceeding under the provisions of the act. Receiving no relief from their alleged grievances, in the courts of the commonwealth, the petitioners appealed to the National Supreme Court, basing their appeal on the ground that the act of the legislature violated the constitution of the United States in four points: (1) it created an involuntary servitude contrary to the thirteenth amendment; (2) it abridged the privileges and immunities of national citizens; (3) it denied the petitioners the equal protection of the laws; and, (4) it deprived them of their property without due process of law. —the latter three in violation of the first section of the Fourteenth Amendment.[1] Only the second of these need here be considered.

We do not conceal from ourselves, [reads the majority opinion],[2] the great responsibility which this duty devolves upon us. No questions so far-reaching and pervading in their consequence, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States, and of the several states to each other and to the citizens of the states and of the United States, have been before this court during the official life of any of its present members.

Then Mr. Justice Miller, the spokesman of the majority, emphasizes in a strong and lucid way these basic points: (1) that, while the occasion and chief object of the war amendments were to safeguard and protect the newly emancipated folk, yet their language and provisions are applicable as well to persons of other races and conditions;[3] (2) that citizenship in the United States is of a dual nature—that

[1] Slaughter House Cases, 16 Wall. 66.

[2] *Ibid.*, 67.

[3] *Ibid.*, 71, 72.

of the nation and that of the commonwealths;[1] (3) that corresponding to each citizenship there is a separate and distinct range of privileges and immunities, guaranteed in each case by the government under which they arise.[2]

Using as a test, the definitions laid down in Corfield *v.* Coryell, 4 Wash. 371, and Paul *v.* Virginia, 8 Wall. 180, the court finds no difficulty in allotting the rights claimed by the petitioners to the class of privileges and immunities belonging to the citizens of the commonwealths and as such beyond the jurisdiction of the central government.[3]

It adds this important *dictum*:[4]

But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal government, its national character, its constitution, or its laws.

One of these is well described in the case of Crandall *v.* Nevada.[5] It is said to be the right of the citizen of this great country, protected by implied guarantees of its constitution, "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its function. He has the right of free access to its seaports, through which all operations of foreign commerce are conducted, to the subtreasuries, land-offices, and courts of justice in the several States." . . .

Another privilege of a citizen of the United States is to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government. Of this there

[1] Slaughter House Cases, 16 Wall. 73, 74.

[2] *Ibid.*, 74.

[3] *Ibid.*, 75 *et seq.*

[4] *Ibid.*, 79.

[5] Considered in Chapter 3, *supra*.

can be no doubt, nor that the right depends upon his character as a citizen of the United States. The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal constitution. The right to use the navigable waters of the United States, however they may penetrate the territory of the several states, all rights secured to our citizens by treaties with foreign nations, are dependent upon citizenship of the United States, and not citizenship of a state. One of these privileges is conferred by the very article under consideration. It is that a citizen of the United States can, of his own volition, become a citizen of any state of the Union by a bona fide residence therein, with the same rights as other citizens of that state. To these may be added the rights secured by the thirteenth and fifteenth articles of amendment, and by the other clause of the fourteenth, next to be considered.

This *dictum* looks back and finds that the court in the past has pretty well defined the fundamental principles governing the privileges and immunities of citizens of the United States. To the enumeration already made, it adds further illustrations. It points the road over which the court is to travel in years to come encountering new scenes from time to time but never deviating from the central path.[1]

Following out these general principles of the *dictum* of 1873, (which was merely a reiteration of doctrines already well established), the court has had occasion to deal with several specific privileges and immunities. (In the case of the United States *v.* Waddell,[2] it was held to be a privilege of national citizens to remain unmolested on a homestead during the period of residence prescribed by statute as preliminary to the acquisition of full and final title; for the

[1] From the majority opinion in this case, Chief Justice Chase and Justices Field, Bradley, and Swayne, dissented.

[2] 112 U. S. 76.

individual in this case was engaged in fulfilling requirements specified by Congress, acting within its unquestioned sphere, and, so, clearly under the jurisdiction of the United States.

Again, citizen-prisoners in the custody of the central government have a right as citizens to the protection of that government. Furthermore,

> it is the duty and the right, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of, any breach of the peace of the United States. It is the right, as well as the duty, of every citizen, when called upon by the proper officer, to act as part of the *posse comitatus* in upholding the laws of his country. It is likewise his right and his duty to communicate to the executive officers any information which he has of the commission of an offense against those laws; and such information, given by a private citizen, is a privileged and confidential communication, for which no action of libel or slander will lie, and the disclosure of which cannot be compelled without the assent of the government.[2]

This opinion was given in a case arising under Revised Statutes 5508 which deals with the punishment of conspiracies "to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States, or because of his having so exercised the same." The petitioners were accused of such a conspiracy against a national citizen who had informed a Deputy Marshal of certain violations of the internal revenue laws in regard to distilleries.

But, continues the court.[3]

[1] Logan *v.* U. S., 144 U. S. 263, 285, 293, 294.

[2] *In re* Quarles and Butler, 158 U. S. 532, 535, 537.

[3] *Ibid.*, 536.

The right of a citizen informing of a violation of law, like the right of a prisoner in custody upon a charge of such violation, to be protected against lawless violence, does not depend upon any of the Amendments to the constitution, but arises out of the creation and establishment by the constitution itself of a national government, paramount and supreme within its sphere of action. . . . Both are, within the concise definition of the Chief Justice in an earlier case, "privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States." [1]

This opinion is not intended to imply that the rights here considered are not included in the "privileges and immunities" clause of the Fourteenth Amendment. It simply shows the method of procedure which must be resorted to in every case. The provision of the amendment merely prohibits the commonwealths from making or enforcing any law abridging the privileges and immunities of national citizens; and the source and sanction of such privileges and immunities must be sought elsewhere in the constitution.

In the case of the United States *v.* Cruikshank, to be referred to again in another connection, the court in the following words described another privilege of citizens of the United States: [2]

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, Republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

[1] *In re* Kemmler, 136 U. S. 436, 448.

[2] 92 U. S. 542, 552.

The question as to whether or not the privilege of voting is one arising out of national citizenship has come up again and again and is a somewhat complicated and confusing one. There are few provisions in the constitution bearing on the problem at all, and those which do exist are general in their terms and take on a definite meaning only after they have been interpreted by the court.

[Article I, 2, provides that] the electors in each state shall have the Qualifications requisite for electors of the most numerous Branch of the state Legislature.

[Article I, 4 reads:] The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

[Article II, 1, deals with the selection of presidential electors.] The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

[Article XIV of the Amendments, sec. 2, provides that] when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a state, or the members of the Legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

[Article XV of the Amendments is in these words:] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. The

Congress shall have power to enforce this article by appropriate legislation.

What was probably the first case involving this question arose in the Circuit Court of the United States, in the Northern District of New York.[1] The defendant, a woman, was indicted on a charge of voting at a congressional election in open violation of the election laws of New York under which the suffrage was limited to males. In defence, she claimed the privilege as one arising from her capacity as a citizen of the United States. Mr. Circuit Justice Hunt without hesitation assigned the alleged privilege to the category of rights belonging to citizens of the commonwealths and, consequently, beyond the sphere of the central government. The Justice, however, suggested that there were certain privileges and immunities of national citizens which were closely allied to the one here erroneously claimed. Thus he refers to them:

If the legislature of the state of New York should require a higher qualification in a voter for a representative in Congress than is required for a voter for a member of the House of Assembly of the state, this would . . . be a violation of a right belonging to a person as a citizen of the United States. That right is in relation to a Federal subject or interest, and is guaranteed by the Federal constitution. The inability of a state to abridge the right of voting on account of race, color, or previous condition of servitude arises from a federal guaranty. Its violation would be the denial of a Federal right—that is, a right belonging to the claimant as a citizen of the United States.[2]

In 1874, the same point was passed upon by the Supreme

[1] U. S. *v.* Anthony, 11 Blatchf. 200.

[2] *Ibid.*, 205.

Court of the United States, in the case of Minor *v.* Happersett.[1] Mr. Chief Justice Waite, speaking for a unanimous court, made it clear that the authority and power to regulate the suffrage had always been within the exclusive jurisdiction of the commonwealths. Then in his characteristic language he concludes: "The constitution does not define the privileges and immunities of citizens. For that definition we must look elsewhere. . . . The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had." [2]

He also brought out the effect of the Fifteenth Amendment in two opinions given the following year.[3] In both cases the accused were discharged on account of the insufficiency of the charges under the statutes then in force, but the authority of Congress to legislate further was clearly recognized. Concerning the last amendment, the Chief Justice expressed the following as the opinion of the court:[4]

"The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, color, or previous condition of servitude, as it was on account of age, property, or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this dis-

[1] 21 Wall. 162.

[2] *Ibid.*, 170, 171.

[3] U. S. *v.* Reese, 92 U. S. 214; U. S. *v.* Cruikshank, 92 U. S. 542.

[4] U. S. *v.* Reese, 92 U. S. 214, 217.

crimination: now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. . . . From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, color, or previous condition of servitude, is. The right to vote in the states comes from the states; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the constitution of the United States; but the last has been.[1]

However, by a unanimous court, expressing itself through Mr. Justice Miller, it was held in 1884 that the privileges of national citizens, duly qualified to vote under the laws of the commonwealths, to exercise that privilege free from molestation, at an election in which members of Congress or presidential electors are being selected, is a right under the central government at least to the extent that it has the protection of that government.[2] According to this opinion,[3]

it is not correct to say that the right to vote for a member of Congress does not depend on the constitution of the United States. The office, if it be properly called an office, is created by that constitution and by that alone. . . . The states in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress. Nor can they prescribe the qualifications for voters for those *eo nomine*.

[1] U. S. *v.* Cruikshank, 92 U. S. 542, 555. A similar conclusion was made in the Reese case, p. 217; but the one quoted was selected on account of its greater pointedness.

[2] *Ex parte* Yarbrough, 110 U. S. 651, 662.

[3] *Ibid.*, 663.

They define who are to vote for the popular branch of their own legislature, and the constitution of the United States says the same persons shall vote for members of Congress in that state. It adopts the qualifications thus furnished as the qualifications of its own electors for members of Congress. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right to depend exclusively on the law of the state.

The last sentence is the one which harmonizes the decision in this case with all the earlier cases. The commonwealths may confer the right to vote or deny that right at will, except as limited by the late amendments. But the privilege of exercising that right freely and safely in the election of federal officers becomes at once a privilege under the central government. The distinction is, no doubt, a little strained. It is really the distinction between the privilege of getting permission to vote and the privilege of actually voting. In fact, the court in this very case [1] finds a much less involved justification for the federal supervision of such elections in the constitutional provision quoted above relating to " the times, places, and manner of holding elections." The whole opinion in this case has been upheld in several later cases.[2] But, while the ultimate foundation of the privilege of voting for federal officers is to be found in the national constitution, the right to vote for officers of the commonwealths is exclusively within the jurisdiction of the governments of those commonwealths, again with the limitations imposed by the two last amendments.[3]

[1] *Ex parte* Yarbrough, 110 U. S. 660, 661.

[2] McPherson *v.* Blacker, 146 U. S. 1; Wiley *v.* Sinkler, 179 U. S. 58; Mason *v.* Missouri, 179 U. S. 328; Mills *v.* Green, 67 Fed. 818; U. S. *v.* Given, 25 Fed. Cas. 1328. See also *In re* Coy, 127 U. S. 731; Murphy *v.* Ramsey, 114 U. S. 15; U. S. *v.* Crosby, 25 Fed. Cas. 701; U. S. *v.* Goldman, 25 Fed. Cas. 1350.

[3] Pope *v.* Williams, 193 U. S. 621.

Thus far have been considered in the main alleged privileges and immunities which have been affirmed by the court. But during the forty-five years which have passed since the Fourteenth Amendment was adopted almost an infinite variety of rights have been claimed under its "privileges and immunities" clause, which, upon examination, have been found to belong either under the exclusive jurisdiction of the commonwealths or under some other clause of the federal constitution. But, at the same time as the court has been giving these negative opinions holding that the rights claimed are not privileges and immunities of national citizens, it has in the same negative way and through a gradual process of elimination been defining more and more clearly just what those privileges and immunities are.

Thus the right to practice law before the courts of the commonwealths is not one arising out of national citizenship.[1] The same is true of the right to practice medicine.[2] In a very recent case, protection for the latter right was sought under the "due process of law" clause.[3]

Legislative enactments prohibiting the intermarriage of the white and black races are exclusively within the jurisdiction of the commonwealths, and in no way impair the rights of national citizens.[4]

Nor is it a privilege or immunity of such citizens to be exempt from taxes in one commonwealth on bonds secured

[1] Bradwell *v.* State, 16 Wall. 130; *In re* Lockwood, 154 U. S. 116; In the matter of Charles Taylor, 48 Md., 28; Philbrook *v.* Newman, 85 Fed. 139.

[2] Dent *v.* West Virginia, 129 U. S. 114; Parks *v.* State, 159 Ill. 211; Reetz *v.* Michigan, 188 U. S. 505. To the contrary: People *v.* Phippin, 70 Mich. 6.

[3] Collins *v.* Texas, 223 U. S. 288.

[4] *Ex parte* Kinney, 14 Fed. Cas. 602; State *v.* Jacobson, 80 Mo. 175; *Ex parte* Francois, 9 Fed. Cas. 699.

by a mortgage on real estate located in another,[1] or from an inheritance tax on property situated in a commonwealth other than the one in which the testator was domiciled at the time of his death.[2]

The opinion, concurred in by all the members of the court, in 1873, "that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States, and in this regard the case falls within the principles laid down by this court in the Slaughter-House cases," [3] has been affirmed in a number of cases,[4] and has been extended to include as well the right to manufacture those liquors.[5] The same ruling has been made in regard to the sale of oleomargarine[6] and cigarettes.[7] And further, local ordinances requiring persons to secure official permits before they are allowed to sell milk,[8] to move buildings through the streets,[9] to make public ad-

[1] Kirtland *v.* Hotchkiss, 100 U. S. 491, 499. Similarly, Gallup *v.* Schmidt, 183 U. S. 300.

[2] Blackstone *v.* Miller, 188 U. S. 189. Transfer tax itself held not to be an abridgment, in Orr. *v.* Gilman, 183 U. S. 278.

[3] Bartemeyer *v.* Iowa, 18 Wall. 129, 133.

[4] Beer Co. *v.* Massachusetts, 97 U. S. 25; Foster *v.* Kansas, 112 U. S. 201; Crowley *v.* Christensen, 137 U. S. 86; Gray *v.* Connecticut, 159 U. S. 74; Cronin *v.* Adams, 192 U. S. 108; Cronin *v.* City of Denver, 192 U. S. 115; Rippey *v.* Texas, 193 U. S. 504; Giozza *v.* Tiernan, 148 U. S. 657; *In re* Hoover, 30 Fed. 51; Cantini *v.* Tillman, 54 Fed. 969; Jacobs Pharmacy Co. *v.* City of Atlanta, 89 Fed. 244.

[5] Mugler *v.* Kansas, 123 U. S. 623; Kidd *v.* Pearson, 128 U. S. 1. See also, The License Cases, 5 How. 504, and for a suggested limitation, *Ex parte* Brown, 38 Tex. Crim. R. 295.

[6] Wright *v.* State, 88 Md. 436; Powell *v.* Pennsylvania, 127 U. S. 678; Plumley *v.* Massachusetts, 155 U. S. 461, and cases cited.

[7] Gundling *v.* Chicago, 177 U. S. 183; Austin *v.* Tennessee, 179 U. S. 343.

[8] Lieberman *v.* Van De Carr, 199 U. S. 552.

[9] Wilson *v.* Eureka City, 173 U. S. 32.

dresses in the parks or other common places of the city,[1] to erect stables within the city limits,[2] etc., have been construed to be within the legitimate police powers of the commonwealths, and not to be infringements upon the privileges and immunities of citizens of the United States.

Before turning to the other long lines of decisions which, like those just considered, had their beginning in the early seventies, a group of cases must be noted, which, from the point of view of its importance, takes rank with the Slaughter-House cases decided just a decade earlier. On March 1, 1875, Congress passed "an act to protect all citizens in their civil and legal rights." The first section of this act provided

> that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

The second section defined the penalties.[3] Under this act, five cases were brought to the Supreme Court by national citizens of the negro race:[4] from Kansas and from Missouri came the complaint that hotel accommodations had been denied; in California and in New York, it was theatre-privileges; and in Tennessee, it was railway accommodations. The opinion was given in the October term of 1883, and from it Mr. Justice Harlan alone dissented.

[1] Davis *v.* Massachusetts, 167 U. S. 43, 47.

[2] Fischer *v.* St. Louis, 194 U. S. 361; Schefe *v.* St. Louis, 194 U. S. 373.

[3] 18 U. S. St. at Large, 335.

[4] Civil Rights Cases, 109 U. S. 3.

The act was held unconstitutional and void. In taking this view, the court suggested that the adjustment of the "social" relations of individuals in a community is beyond the authority of Congress.[1] But the actual basis for the decision is found in the fact that the legislation which Congress is authorized to enact under the Fourteenth Amendment is corrective or remedial rather than direct or primary, and is applicable to the action of the commonwealths rather than that of individuals. Says the court:[2]

> It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States. . . . It not only does this, but, in order that the national will, thus declared, may not be a mere *brutum fulmen*, the last section of the Amendment invests Congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void and innocuous.

In the domain of the administration of justice the large number of rights which have been claimed from time to time has built a line of decisions reaching from 1875 to the present time. According to the opinion in the case of Walker *v.* Sauvinet,[3] "a trial by jury in suits at common-law pending in the state courts is not . . . a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge." The same has been held true for civil and criminal suits alike,[4]

[1] Civil Rights Cases, 109 U. S. 22.

[2] *Ibid.*, 11.

[3] 92 U. S. 90, 92.

[4] Maxwell *v.* Dow, 176 U. S. 581; Eilenbecker *v.* Dist. Ct. of Plymouth Co., 134 U. S. 31; Iowa Central Ry. Co. *v.* Iowa, 160 U. S. 389; Miller *v.* Texas, 153 U. S. 535; State *v.* Bates, 14 Utah 293.

and for grand jury indictments or presentments.[1] The right to appeal to the highest court of the commonwealth is not one proceeding from national citizenship.[2] Nor is it a privilege of such citizenship for an individual to be indicted or tried by a jury composed in whole or in part of persons of his own race[3]—but the legislation of Congress under the fifth section and the "equal protection" clause of the Fourteenth Amendment makes it necessary that all races be equally eligible to service on such juries. Exemption from cruel and unusual punishments has been more than once claimed as an immunity of national citizens, but the claim has never been affirmed.[4] So far as the central government has authority at all to give protection in this matter, that authority must proceed from the "due process" provisions. A personal summons can not be demanded as a right of citizenship,[5] nor a release on bail,[6] nor new trials without limitation,[7] nor exemption from compulsory self-incrimination,[8] nor asylum in a commonwealth to which a claimant may have gone as a fugitive from justice.[9]

[1] Maxwell *v.* Dow, 176 U. S. 581.

[2] Missouri *v.* Lewis, 101 U. S. 22.

[3] Strauder *v.* West Virginia, 100 U. S. 303; Virginia *v.* Rives, 100 U. S. 313; *Ex parte* Virginia, 100 U. S. 339; Bush *v.* Kentucky, 107 U. S. 110; Gibson *v.* Mississippi, 162 U. S. 565.

[4] *In re* Kemmler, 136 U. S. 436; McElvaine *v.* Brush, 142 U. S. 155; Holden *v.* Minnesota, 137 U. S. 483.

[5] Ballard *v.* Hunter, 204 U. S. 241.

[6] McKane *v.* Durston, 153 U. S. 684.

[7] Louisville & Nashville Ry. Co. *v.* Woodson, 134 U. S. 614.

[8] Twining *v.* New Jersey, 211 U. S. 78, 99; Rhodus *v.* Manning, 217 U. S. 597; Brown *v.* Walker, 161 U. S. 591; Spies *v.* Illinois, 123 U. S. 131.

[9] 34 Fed. 525. Examples similar to those enumerated are referred to in: *In re* Converse, 137 U. S. 624; Stevens's Adm. *v.* Nichols, 157 U. S. 370.

The extreme unreasonableness of some of these claims is well illustrated by a very recent case in which the plaintiff alleged immunity from double jeopardy as a right of national citizens. Mr. Justice Hughes gives the following interesting record of the claimant in this case: [1]

In April, 1898, the plaintiff in error, James H. Graham, then known as John H. Ratliff, was indicted for grand larceny in Pochahontas County, West Virginia, pleaded guilty, and was sentenced to the penitentiary for two years. In April, 1901, under the name of Ratliff, he was indicted for burglary in Pochahontas County, West Virginia, pleaded guilty, and was sentenced to the penitentiary for ten years. In October, 1906, he was granted a parole by the governor of West Virginia upon condition that he should pursue the course of a law-abiding citizen. In September, 1907, under the name of John H. Graham, *alias* J. H. Gray, he was indicted in Wood County, West Virginia, for grand larceny, pleaded guilty and was sentenced to the penitentiary for five years.

When his identity was discovered, he was sentenced for life, as required by the laws of the commonwealth in cases of second or third convictions. The court found in the facts no instance of subjection to double jeopardy, and, therefore, did not pass upon the question raised. However, judging from the other decisions of the court, the answer would probably have been a disavowal of the claim.

In the case of Presser *v.* Illinois,[2] it was held not to be a privilege of national citizens to arm private military companies and to conduct drills and parades in violation of local laws and ordinances. And in a highly patriotic opinion, Mr. Justice Harlan struck down the last defence of a flagrant abuse by declaring that " we cannot hold that

[1] Graham *v.* West Virginia, 224 U. S. 616.

[2] 116 U. S. 252.

any privilege of American citizenship or that any right of personal liberty is violated by a state enactment forbidding the flag to be used as an advertisement on a bottle of beer." [1]

It has been held that the alleged "inherent right of every freeman to care for his own body and health in such way as to him seems best" is not a privilege of federal citizenship.[2] Parents can not look to this citizenship for protection of their "inherent right" to the custody of their children.[3] So also the privilege of attending the public schools has been held not to arise from this citizenship.[4]

The legislative enactments of the commonwealths regulating the hours of labor have in several instances been alleged to be abridgments of the privileges and immunities of citizens of the United States;[5] but they have never been set aside on this ground, for they come more properly under the "due process" and "equal protection" clauses. The same has been held in regard to the matter of equal accommodations by carriers,[6] the keeping of markets,[7] and billiard halls;[8] and, during the present term of the court, it

[1] Halter *v.* Nebraska, 205 U. S. 34, 42.

[2] Jacobson *v.* Massachusetts, 197 U. S. 11, 26 (a vaccination case).

[3] Wadleigh *v.* Newhall, 136 Fed. 941.

[4] Lehew *v.* Brummell, 103 Mo. 546; Ward *v.* Flood, 48 Cal. 36; Cumming *v.* Bd. of Ed., 175 U. S. 528.

[5] Holden *v.* Hardy, 169 U. S. 366. (See p. 387 for a very broad and liberal view of the constitution expressed by Mr. J. Brown.) Muller *v.* Oregon, 208 U. S. 412; Lochner *v.* New York, 198 U. S. 45; Ellis *v.* U. S. 206 U. S. 246; Addyston Pipe & Steel Co. *v.* U. S., 175 U. S. 211, 229, 230. On a related matter see Barbier *v.* Connolly, 113 U. S. 27; Yick Wo *v.* Hopkins, 118 U. S. 356.

[6] Plessy *v.* Ferguson, 163 U. S. 537; Chiles *v.* Chesapeake & Ohio Ry. Co., 218 U. S. 71; McCabe *v.* Atchison T. & S. Fe Ry. Co., 186 Fed. 966. To the contrary, Coger *v.* N. W. Union Packet Co., 37 Ia. 145.

[7] Natal *v.* Louisiana, 139 U. S. 621.

[8] Murphy *v.* California, 225 U. S. 623.

was held that no privilege or immunity of national citizens was abridged by the New York law which made it a criminal offence for a second-hand dealer to receive stolen property without first making a diligent inquiry.[1] In the case of Chadwick *v.* Kelley[2] was considered but not decided the question as to whether or not an ordinance requiring contractors for public work to employ only resident citizens abridged the privileges and immunities of national citizens.

Except for an unanswered *quaere* or two, suggesting the possibility that the Fourteenth Amendment was intended to make the rights included in the Fourth and Fifth Amendments privileges and immunities of national citizens,[3] the decisions of the Supreme Court have uniformly carried out the principles developed before the war and established by the Slaughter-House *dictum.* Taking the four leading cases which may well be regarded as the milestones of the after-war period, it is clear that the court has evidenced no tendency to depart from the principles originally laid down. From the opinion in the Slaughter-House Cases (16 Wall. 36, 1873), four Justices dissented. In the Civil Rights Cases (109 U. S. 3, 1884), Mr. Justice Harlan stood alone in the minority. When the case of Maxwell *v.* Dow (176 U. S. 581), was decided in 1900, Mr. Justice Harlan stood where he had stood in 1884, and where he still continued to stand in 1908, when the opinion in Twining *v.* New Jersey (211 U. S. 78) was given. This last case reviews approvingly all the important decisions of the past and may so be regarded as settling with a fair degree of permanency the boundaries of the privileges and immunities of citizens of the United States, leaving for future determination only the question as to whether or not specific rights which may be alleged fall within these limits.

[1] Rosenthal *v.* People, 33 S. Ct. 27.

[2] 187 U. S. 540, 546.

[3] Consolidated Rendering Co. *v.* Vermont, 207 U. S. 541; Addams *v.* New York, 192 U. S. 585.

CHAPTER V

The Other View

In the Slaughter-House Cases, already considered, the Supreme Court was called upon for the first time to construe the "privileges and immunities" clause of the Fourteenth Amendment, but that was not the first case to arise in the federal courts under that provision. About two years earlier, a definition had been attempted by Mr. Justice Woods who was holding a Circuit Court in the southern district of Alabama. The decision of this court is of interest and importance, not only because it was the first one rendered under this particular part of the amendment, but also because it was the first judicial expression of the other view—the view which in the Slaughter-House Cases was adhered to by four of nine Justices and which has been maintained by a constantly dwindling minority, up to the present time.

The case arose on a charge of conspiracy to prevent certain citizens from exercising the rights of freedom of speech and of assembly, rights alleged to be among those protected by the Fourteenth Amendment.[1]

> What, [asks the Justice], are the privileges and immunities of citizens of the United States here referred to? They are undoubtedly those which may be denominated fundamental; which belong of right to the citizens of all free states, and which have at all times been enjoyed by the citizens of the several states which compose this union from the time of their

[1] U. S. *v.* Hall, 26 Fed. Cas. 79, 81, 82.

becoming free, independent and sovereign. . . . Among these we are safe in including those which in the constitution are expressly secured to the people, either as against the action of the federal or state governments. Included in these are the right of freedom of speech and the right peaceably to assemble. . . . Congress is forbidden to impair them by the First Amendment, and the states are forbidden to impair them by the Fourteenth Amendment. . . . We think, therefore, that the right of freedom of speech, and the other rights enumerated in the first eight articles of amendment to the constitution of the United States, are the privileges and immunities of citizens of the United States, that they are secured by the constitution, that Congress has the power to protect them by appropriate legislation.

In a very strong and elaborate dissenting opinion in the Slaughter-House Cases, Mr. Justice Field follows the same line of argument as used by the Circuit Court and repeats the central contention that "the privileges and immunities designated are those which of right belong to the citizens of all free governments." [1] He finds the precedents and the evidence to support his view in the case of Corfield *v.* Coryell (4 Wash. 380), the Civil Rights Act of 1866, the debates of the 39th Congress, the general object of the Fourteenth Amendment, *etc.*[2] The particular right for which he sought protection was "the right to pursue a lawful employment in a lawful manner, *without other restraint than such as equally affects all persons.*" [3]

The other Justices who concurred in the dissenting opinion, without question agreed with Mr. Justice Field in his construction of the "privileges and immunities"

[1] Slaughter House Cases, 16 Wall. 36, 97.

[2] *Ibid.*, 89, 96, 97 *et al.*

[3] *Ibid.*, 97.

clause;[1] but it is important to note that they emphasized (as did Mr. Justice Field in part), the bearing of the "due process" and "equal protection" clauses upon the point at issue.[2] In fact some of the words quoted above from the leading dissenting opinion would at least suggest that the person who uttered them did not have in mind any idea of sharply distinguishing the provisions of the latter clauses from those of the former.

Two of the Justices who dissented in this case,[3] held with the majority in the Civil Rights Cases that the authority of Congress under the amendments did not comprehend the sphere of social relations nor extend to the acts of individuals, but was strictly limited to remedial measures affecting offending commonwealths.[4] Mr. Justice Harlan alone dissented; and he only on the ground that the amendments conferred upon the individual citizen the right of exemption from race discriminations and guaranteed to him protection against the abridgment of this right whether perpetrated by commonwealths or by individuals.[5] Looked at with the perspective which a day three decades removed from the event affords, the view of the dissenting Justice appears remarkably reasonable, just, and logical.

Another case of the same year, which the majority of the court decided solely from the point of view of the impairment of the obligation of contracts, gave Mr. Justice Field and Mr. Justice Bradley an opportunity to repeat and to emphasize their dissents in the Slaughter-House Cases.[6] This time in the form of concurring opinions, but again

[1] Slaughter House Cases, 16 Wall. 122, 126 *et al.*

[2] *Ibid.*, 122, 127.

[3] Justices Field and Bradley.

[4] 109 U. S. 3 and *supra*.

[5] *Ibid.*, 26 *et seq.*

[6] Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746.

based upon the doctrines of the Declaration of Independence and the case of Corfield *v.* Coryell.[1] The same view was expressed a little differently in 1891:[2]

While the ten amendments, as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal government and not to the states, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon state power by ordaining that no state shall make or enforce any law which shall abridge them.

Mr. Justice Harlan gives a more pointed statement of the minority view in the case of Maxwell *v.* Dow,[3] where he says:

What are the privileges and immunities of "citizens of the United States"? Without attempting to enumerate them, it ought to be deemed safe to say that such privileges and immunities embrace at least those expressly recognized by the Constitution of the United States and placed beyond the power of Congress to take away or impair. . . . It seems to me that the privileges and immunities enumerated in these amendments [the first eight] belong to every citizen of the United States. They were universally so regarded prior to the adoption of the Fourteenth Amendment. . . . I am of opinion that under the original Constitution and the Sixth Amendment, it is one of the privileges and immunities of citizens of the United States that when charged with crime they shall be tried only by a jury composed of twelve persons; consequently, a state statute authorizing the trial by a jury of eight persons of a

[1] *Op. cit.*, 757, 764.

[2] Mr. Justice Field, O'Neil *v.* Vermont, 144 U. S. 323, 363.

[3] 176 U. S. 581, 606, 608, 612.

citizen of the United States, charged with crime, is void under the Fourteenth Amendment.

The distinguished Justice reveals even a greater conviction of the correctness and justness of this view in his dissenting opinion in the recent case of Twining *v.* New Jersey.[1] But, as before stated, there has been no tendency towards the adoption of this view by the court.

The two views merge into one on the big question of the effect of the Fourteenth Amendment. Tersely put, the first and the fifth sections of that article provide that Congress shall have power to prevent the commonwealths, (1) from abridging the privileges and immunities of citizens of the United States, (2) from depriving any person of his life, liberty, or property without due process of law, and (3) from denying to any person within their jurisdiction the equal protection of the law. This amendment places no new privileges and immunities under national citizenship. It simply delegates to *Congress* in specific terms the authority to protect against infringement by the commonwealths privileges and immunities already long in existence but only newly made applicable to the persons whose protection the people had primarily in mind when through their representatives they adopted the amendment.

But the views diverge abruptly on the question of what were the privileges and immunities of national citizens prior to the adoption of the Fourteenth Amendment. The growing majority has found the only logical source of these rights, privileges, immunities, to be within the well-defined spheres in which the national government has been given authority to act, specifically or by implication, with limitations or without; for a right, privilege, immunity, alleged outside of these spheres would be beyond the protection of

[1] 211 U. S. 78, 114, 123.

the government, and so, of no avail. More specifically, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." But this is simply a prohibition upon Congress; and nowhere is the central government given authority to provide for religious freedom. If a citizen of the United States should allege this as a privilege or immunity inherent in his citizenship, where would he find the governmental authority to protect and enforce his claim?

And, again, the Sixth Amendment requires that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed." Here also the limitation is exclusively upon the national government, but in a sphere where, by Article III of the constitution, that government has been granted extensive jurisdiction. So far, therefore, as this jurisdiction extends, the privilege of the Sixth Amendment is an enforceable one; but if it were alleged as a right in a trial in the courts of the commonwealths, it would be no more effective than the claim to religious liberty under the First Amendment, for it would be beyond the protection of the central government.

As a third illustration of the majority view: the right, privilege or immunity of a citizen to the protection of his government on the high seas or in foreign countries is one which can be made effective because it comes in the domain of foreign affairs in which the national government has exclusive and very comprehensive jurisdiction.

The minority, on the other hand, always adhering more or less to the doctrine of natural rights, has looked for these privileges and immunities in the unbounded category of fundamental rights inherent in the citizens of all free gov-

ernments, or, if not that whole category, then "at least those expressly recognized by the constitution of the United States and placed beyond the power of Congress to take away or impair." Many of these are found enumerated in the first eight amendments. In fact, it is to these amendments that those of the minority look for a concrete list of the privileges and immunities of citizens of the United States at the time of the adoption of the War amendments. The Fourteenth Amendment protects these same rights from abridgment by the commonwealths: religious freedom removed from the interference not only of Congress but also of the commonwealths; trial by jury not only in the federal courts but also in the courts of the commonwealths; *etc.*, through the whole list.

According to this view, one of the most important groups of privileges and immunities of national citizens would be the fundamental one guaranteed by the Fifth Amendment. "Nor shall any person . . . be deprived of life, liberty, or property, without due process of law." And yet the makers of the Fourteenth Amendment, after clearly protecting all the privileges and immunities of national citizens ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"), found it necessary to add an almost *verbatim* insertion of the great clause of the Fifth Amendment in order to make it applicable to the commonwealths. ("Nor shall any state deprive any person of life, liberty, or property, without due process of law").

It may well be repeated here as a closing thought that the clauses of the first section of the Fourteenth Amendment *taken together* secure to an increasingly considerable degree those fundamental rights so earnestly defended by the minority; but the "privileges and immunities" clause is only one of three important clauses, and its meaning is limited.

PART III

SUMMARY AND CONCLUSION

CHAPTER VI

Concluding Definition

A final look backward for a general view of the long course which has been traversed will find a few landmarks standing out prominently against the horizon. It should be remembered that the Supreme Court has reached its conclusion after studying and observing the government and the experiences of the United States for more than a hundred years. Its opinions have tended in the same direction from the beginning up to the present, only shaken and deflected a little, as was everything else in America, by the great crisis of the mid-century.

As a preliminary to and a basis for a definition of the privileges and immunities of citizens of the United States, the court has deemed essential an understanding of the fundamental nature of the American system of government and of citizenship. The fact that in the United States there are two co-ordinate governments—that of the nation and that of each particular commonwealth—has caused the differentiation of two distinct citizenships corresponding in their extent, limitations, and magnitude to the respective governments from whch they arise and upon which they depend. The national government being one of delegated and enumerated powers can give rise only to a limited citizenship. The governments of the commonwealths have reserved and general powers, and the citizenship under them is co-extensive with the powers.

Each of these citizenships has its quota of privileges and

immunities, protected by the government under which they arise and from which they receive their sanction and force. They are not absolute; for, as Mr. Justice Field admirably puts it, "the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community": [1] or, in the words of Mr. Justice Day, they "have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as is necessary for the general good." [2]

Building upon these fundamental principles, the court has concluded that the privileges and immunities which are peculiar to citizens of the United States are those which arise from the powers conferred upon the national government, which are *completely* protected by that government, and which are enjoyed by the individual because he is a citizen. No final enumeration of these privileges and immunities has ever been made, nor can one ever be made under a living constitution like that of the United States; but the examples which the court has given are sufficient to illustrate the meaning of the definition:

1. The privilege of expatriation (Talbot *v.* Janson, 3 Dall. 133, Murray *v.* Schooner Charming Betsy, 2 Cr. 64);

2. Protection of the government in foreign countries and on the high seas (Murray *v.* The Charming Betsy, 2 Cr. 64, Neely *v.* Henkel, 180 U. S. 109);

3. Access to all parts of the federal government, and free passage from place to place (Crandall *v.* Nevada, 6 Wall 35);

4. (a) The use of navigable waters,

(b) The privilege of becoming citizens of the common-

[1] Crowley *v.* Christensen, 137 U. S. 86, 89.

[2] Tiger *v.* Western Investment Co., 221 U. S. 286, 315.

wealths through residence (*Dicta* in the Slaughter-House Cases, 16 Wall, 36);

5. The right peaceably to assemble and petition Congress (U. S. *v.* Cruikshank, 92 U. S. 542);

6. Exemption from race-discrimination (U. S. *v.* Reese, 92 U. S. 214, U. S. *v.* Cruikshank, 92 U. S. 542);

7. The right to exercise freely the privilege of voting for members of Congress and presidential electors (*Ex parte* Yarbrough, 110 U. S. 651);

8. The unmolested access to and residence upon a homestead while the requirements for full title are being fulfilled (U. S. *v.* Waddell, 112 U. S. 76);

9. Protection from violence while in the custody of the federal government (Logan *v.* U. S., 144 U. S. 263);

10. The privilege of informing the government of violations of its laws (*In re* Quarles & Butler, 158 U. S. 532);

11. Free migration (Williams *v.* Fears, 179 U. S. 270).

12. The right to enter the country, and, if questioned, to prove citizenship (Chin Yow *v.* U. S., 208 U. S. 8).

The rights from time to time alleged to be privileges and immunities of national citizens but never upheld by the court, need not be repeated here. They were for the most part rights which fall within the legitimate jurisdiction of the commonwealths, or, if protected at all by the federal government, rights which might be claimed under the "equal protection" or "due process" clauses.

It must be clear that, while the fundamental individual rights of life, liberty, and property (which are among the leading ones of those belonging to all persons under every free government), were, by the Fifth Amendment, protected against infringement by the national government, and against the governments of the commonwealths by the Fourteenth Amendment, still they have never been made privileges and immunities of citizens of the United States either *eo nomine* or by implication.

One of the recognized advances of the constitution over the Articles of Confederation was the arrangement by which the new government was to act also upon individuals and not only upon states. As a result, the national government has power to give *complete* protection to the privileges and immunities of its citizens, not only against abridgements by the commonwealths, but also against infringements by individuals. Rights which do not have this full protection of the government can hardly be regarded as privileges and immunities peculiar to citizens of the United States.

The Fourteenth Amendment created no new privileges and immunities of national citizens. On account of the prejudices against the new class of citizens, it inserted a formal prohibition (which in the American system already existed more than by implication), to prevent the commonwealths from abridging privileges and immunities already existing. But the amendment did much more. It guaranteed (and put the federal government back of the guaranty), to all persons the fundamental rights of life, liberty, property, and equal protection of the law, against any interference by the *commonwealths;* but it left to these commonwealths the power which they had always enjoyed of protecting these sacred rights against impairment by individuals. Concerning the full meaning and scope of these latter clauses the court has as yet by no means said its last word.

PART IV

APPENDIX

LEADING CASES ON THE FUNDAMENTAL NATURE OF THE AMERICAN FEDERAL SYSTEM

Adair *v.* U. S. 208 U. S. 161.
American Land Co. *v.* Zeiss, 219 U. S. 47.
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Smoot *v.* Ky. Central Ry. Co., 13 Fed. R. 337.
Soon Hing *v.* Crowley, 113 U. S. 703.
South Carolina *v.* U. S., 199 U. S. 437.
Sturges *v.* Crowninshield, 4 Wh. 122.
Texas *v.* White, 7 Wall. 700.
Tonawanda *v.* Lyon, 181 U. S. 389.
U. S. *v.* Cruikshank, 92 U. S. 542.
U. S. *v.* Harris, 106 U. S. 629.
U. S. *v.* Reese, 92 U. S. 214.
Virginia, *Ex parte*, 100 U. S. 339.
Virginia *v.* Rives, 100 U. S. 313.
Weaver *v.* Fegely, 39 Penn. St. 27.
Western Union Telegraph Co. *v.* Call Pub. Co., 181 U. S. 92.
Wheaton *v.* Peters, 8 Pet. 591.
Yick Wo *v.* Hopkins, 118 U. S. 356.

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Barron *v.* Baltimore, 7 Pet. 243.
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American Insurance Co. *v.* Canter, 1 Pet. 511.
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Downes *v.* Bidwell, 182 U. S. 244.
Dred Scott *v.* Sandford, 19 How. 339.
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Hawaii *v.* Mankichi, 190 U. S. 197.
Hepburn & Dundas *v.* Ellzey, 2 Cr. 445.
Hope Insurance Co. *v.* Boardman, 5 Cr. 57.
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In re Ah Yup, 1 Fed. Cas. 223.
In re Camille, 6 Fed. R. 256.
In re Ellis, 179 Fed. R. 1002.
In re Halladjian *et al.*, 174 Fed. R. 465.
In re Kanaka Nian, 21 Pac. R. 993.
In re Mudarri, 176 Fed. R. 465.
In re Rodriguez, 81 Fed. R. 337.
In re Saito, 62 Fed. R. 126.
Johannessen *v.* U. S., 225 U. S. 227.

Jones *v.* League, 18 How. 76.
Kelley *v.* Owen, 7 Wall. 496.
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Lanz *v.* Randall, 4 Dill. 425.
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Minneapolis *v.* Reum, 12 U. S. App. 446.
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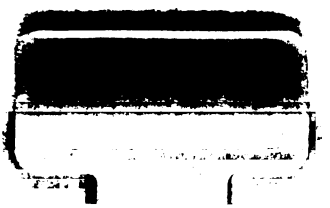

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